



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking into the  
Review of the California High Cost  
Fund B Program

R.06-06-028  
(Filed June 29, 2006)

**REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES  
IN RESPONSE TO THE ASSIGNED COMMISSIONER'S  
RULING ON PHASE II ISSUES RELATING TO THE  
"CALIFORNIA ADVANCED SERVICES FUND"**

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Order Instituting Rulemaking into the Review  
of the California High Cost Fund B Program

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Pursuant to Rule 6.2 of the Rules of Practice and Procedure of the California Public Utilities Commission (CPUC or the Commission) and the September 12, 2007 Assigned Commissioner’s Ruling on Phase II Issues Relating to the “California Advanced Services Fund” (Ruling) in this rulemaking, the Division of Ratepayer Advocates (DRA) submits these Reply Comments regarding issues identified for Phase II of the Commission’s review of the California High Cost Fund-B (CHCF-B or B Fund). Silence on any issue should not be construed as assent.

**I. INTRODUCTION**

In the Opening Comments on the California Advanced Services Fund (CASF) raised in D.07-09-020, parties are almost unanimous in the belief that the creation of a California Advanced Services Fund (CASF) at this time is premature. First and foremost, the Commission needs more reliable data about the availability of broadband, and where and why it is not available. Until the Commission is able to analyze such data on a disaggregated basis, perhaps capitalizing on the mapping project of the Broadband Task Force when it is completed, most parties recommend that the Commission refrain from creating a special funding program for broadband infrastructure. In addition, most parties express grave concern about the Commission’s legal authority to fund the CASF, and recommend obtaining authority from the Legislature to most effectively address the Commission’s objectives. Finally, aside from the legal issues, parties raise a wide variety

of policy and technical concerns that should be addressed in order to successfully implement the CASF program envisioned by the Commission. While DRA strongly supports the development of creative solutions to increase broadband subscription rates, DRA believes that parties have raised compelling concerns that should give the Commission pause before fully embracing the CASF as it is currently proposed.

## **II. DISCUSSION**

### **A. More Data Is Necessary Before Creating a CASF**

Parties' Opening Comments on the CASF program proposed in D.07-09-020 echo DRA's concerns that it is just not the right time, and the B Fund may not be the right vehicle, to attempt to facilitate broadband deployment in California through Commission subsidies. Parties overwhelmingly encourage the Commission to wait until reliable, disaggregated data is available,<sup>1</sup> such as through the Governor's Broadband Task Force mapping efforts. DRA agrees that the Commission should look at granular deployment and other data to determine the nature and extent of any market failures in providing broadband access before committing significant resources to developing, and using ratepayer money to fund, a CASF for infrastructure.

The Opening Comments raise many variations on the theme that there is a critical lack of broadband deployment data. For example, CCTA/Time Warner, T-Mobile, Sprint Nextel, Verizon, and AT&T all question whether broadband build out is actually necessary, and caution that such subsidies might actually serve as a disincentive to competition.<sup>2</sup> SureWest points out that service providers are currently "ramping up their broadband investments" so the Commission can expect that "unserved and underserved" areas that "are economic to serve" will soon receive service.<sup>3</sup> CCTA/Time Warner note

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<sup>1</sup> CCTA and Time Warner Comments at 2, SureWest Comments at 2, Verizon Comments at 1 and 7, T-Mobile Comments at 3, TURN Comments at 4, Sprint Nextel Comments at 2, and AT&T Comments at 16.

<sup>2</sup> CCTA/Time Warner Comments at 2, T-Mobile Comments at 3, Sprint Nextel Comments at 3, Verizon Comments at 1-2, and AT&T Comments at 2.

<sup>3</sup> SureWest Comments at 3.

that is unclear how many unserved areas are located in the “high cost” areas to which the B Fund currently applies.<sup>4</sup>

AT&T, CCTA/Time Warner, SureWest, and Verizon all recommend waiting for the results from the Governor’s Broadband Task Force (Task Force) before creating and implementing the CASF.<sup>5</sup> DRA notes that this recommendation is based on the assumption that Commission staff will have access to all of the underlying, actual build out data on a granular level. The data that Commission staff would need to undertake an analysis that would be useful for implementing a CASF would necessarily be at a level granular enough to identify provider-specific deployment. Thus, to the extent that the ongoing effort by the Broadband Task Force to collect infrastructure data can provide the Commission with granular deployment data, it makes sense to wait for that project to be completed so that the Commission can develop a clearer picture about the broadband infrastructure currently available. Without such data, valid questions can be raised regarding whether there is actually a need to subsidize broadband infrastructure.

Furthermore, to accomplish the Commission’s goal of “bridging the digital divide,” the Commission needs information beyond build out, such as information on: 1) what promotes broadband build out; 2) what forces encourage or limit the competitive market from building broadband infrastructure in various areas of California; 3) whether subsidies would encourage or deter competition; and 5) whether subsidies are the best method of encouraging broadband build out and deployment. TURN references the need for such information and states that the Commission should “fill these important gaps in information so that any ratepayer funds that may ultimately be expended are done so in as targeted, focused and justified manner as possible.”<sup>6</sup> DRA agrees with TURN. In the

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<sup>4</sup> CCTA/Time Warner Comments at 2.

<sup>5</sup> AT&T Comments at 16, CCTA/Time Warner Comments at 2, SureWest Comments at 2, and Verizon Comments at 1.

<sup>6</sup> TURN Comments at 4.

absence of such data, the Commission's ability to craft a targeted and effective program to promote build out of broadband infrastructure is severely hindered.

In sum, parties are almost united in the belief that more data is necessary to gain a clearer picture about the availability and accessibility of broadband, as well as whether a subsidy would remedy any deficiencies in broadband infrastructure, before the Commission goes forward with a CASF.

**B. To Fully Accomplish The Commission's CASF Goals, The Commission Should Obtain Legislative Authority**

Parties are unanimous in urging the Commission to better achieve its broadband goals by obtaining explicit direction from the Legislature.<sup>7</sup> This recommendation generally stems from two areas of concern. First, the legality of creating a CASF within the B Fund program, or even as an independent program, is questionable.<sup>8</sup> DRA shares Sprint Nextel's concern that this uncertainty not only raises the prospect of time-consuming litigation, but that it would also act as a disincentive to companies that may have otherwise considered devoting the resources to applying for a CASF draw and building new facilities in unserved/underserved areas.<sup>9</sup>

Second, the attempt to tailor the CASF so that it stays within the legal confines of the Commission's current jurisdiction limits the Commission's ability to craft an effective program. For example, the CASF would now allow only "telephone corporations" to obtain CASF funding.<sup>10</sup> DRA discusses below that it is problematic as a policy matter to create a new fund that lacks competitive neutrality by its very definition. In addition, the CASF now would require recipients to provide "basic residential

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<sup>7</sup> DRA Comments at 1-2, Small LECs Comments at 2-3; CCTA/Time Warner Comments at 4, SureWest Comments at 2, Verizon Comments at 3, T-Mobile Comments at 11, TURN Comments at 3, Sprint Nextel Comments at 2 and 13.

<sup>8</sup> CCTA/Time Warner Comments at 1, 3-4, SureWest Comments at 2, Verizon Comments at 1, and Sprint Nextel Comments at 4-13.

<sup>9</sup> Sprint Nextel Comments at 3.

<sup>10</sup> D.07-09-020 at 68-72.

service,” apparently as currently defined by the Commission for the purposes of universal service,<sup>11</sup> a requirement that would exclude wireless service providers.<sup>12</sup> DRA shares the concerns of many parties that the CASF as currently drawn would likely do little to stimulate investment from companies and technologies other than ILECs.

DRA also notes that CCTA/Time Warner’s assertion that the Commission cannot “use participation in the CASF to extend its jurisdiction over an unregulated provider.”<sup>13</sup> AT&T also cautions the Commission against any attempt to “extend regulation over services it does not now regulate.”<sup>14</sup> While DRA agrees that the CASF cannot and should not be used to “regulate” broadband providers, the Commission can certainly craft reasonable requirements to ensure that public funds are expended wisely and used for the intended purpose. Even as proposed in D.07-09-020, a company seeking CASF funds would have to voluntarily submit to Commission oversight in certain areas, such as oversight that would enable accounting audits and verification of both actual deployment and actual service speeds. If a company is not willing to comply with these minimal requirements, it need not apply for CASF subsidies. Furthermore, the Commission should also consider that part of broadband “access” provided through a public purpose program is whether the rates are affordable. Thus, in the absence of both a competitive market (a CASF-funded area must be unserved or underserved) and rate limitations on broadband and local voice services, there is no reason to believe that CASF funding will actually foster additional broadband and voice access.

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<sup>11</sup> D.07-09-020 at 60 and 71; 9/12/07 Ruling at 2 (Question 3) (referring to “basic residential service”).

<sup>12</sup> See T-Mobile Comments at 2 and 7. Small LECs state that the Commission should not be picking technological winners and losers and anticipate being able to participate in a CASF, Small LECs Comments at 3-4. However, AT&T recommends excluding Small LECs, AT&T Comments at 9.

<sup>13</sup> CCTA/Time Warner Comments at 4-5.

<sup>14</sup> AT&T Comments at 20.

### **C. There Are Numerous Policy Concerns About The Creation Of a CASF**

In addition to legal issues, parties have identified an array of policy, technical, and practical issues that the Commission should address if it continues to pursue development of a CASF. As T-Mobile accurately states, “[t]he concept of CASF raises more questions than it answers.”<sup>15</sup> In fact, most of the Comments raise more questions than they answer.

One major concern is competitive neutrality. Fundamentally, the CASF proposed in D.07-04-020 that is limited to “telephone corporations” and/or a narrow definition of “basic residential service” would not be competitively neutral.<sup>16</sup> While parties differ about how these two issues should be resolved, there is general consensus that they do need to be resolved by the Commission before CASF is established. AT&T, Verizon, and SureWest all argue that CASF participants must be “telephone corporations”.<sup>17</sup> Sprint Nextel states that it is difficult to imagine the Commission being able to disburse CHCF-B funds to entities other than telephone corporations.<sup>18</sup> On the other hand, CCTA/Time Warner urges that participation in a CASF be open to all broadband providers, not just those that are telephone corporations.<sup>19</sup> DRA notes that, to foster competitive neutrality, a principle often expressed by the Commission in other contexts,<sup>20</sup> the only effective approach would be to obtain legislative authority.

Another major concern is the requirement that CASF recipients provide basic residential service. Clearly, if the current definition of basic residential service from D.06-10-066 is used, many service providers will be excluded from applying to the CASF, including wireless providers, and broadband providers that could provide VoIP

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<sup>15</sup> T-Mobile Comments at 8.

<sup>16</sup> DRA Comments at 4.

<sup>17</sup> AT&T Comments at 20, Verizon Comments at 13, SureWest Comments at 1 and 4.

<sup>18</sup> Sprint Nextel Comments at 25. *See, supra*, Section II.B for DRA’s discussion of this issue.

<sup>19</sup> CCTA/Time Warner Comments at 3.

<sup>20</sup> *See, e.g.*, D.06-08-030 (URF), D.96-10-066 (Universal Service), or a number of decisions in the Local Competition docket R.95-04-043/I.95-04-044.

services.<sup>21</sup> DRA continues to support a more inclusive definition that is more reflective of today's current technology and competitive environment, a view shared by Sprint Nextel and AT&T.<sup>22</sup> Because the requirements relating to "telephone corporations" and "basic residential services" directly affect who may even consider applying for CASF money, the Commission must address at the outset the intertwined legal and policy issues these requirements raise before developing the more detailed aspects of a CASF.

**D. If The Commission Goes Ahead With a CASF There Are Some Additional Fundamental Issues It Must Resolve**

If the Commission decides that a CASF will provide benefits relating to broadband infrastructure development that outweigh the possible harm to competition, there are a number of program and implementation issues that must be resolved. For example, all of the parties who commented on the issue of matching funds agree that CASF applicants should bear some of the risk,<sup>23</sup> a position with which DRA agrees.

AT&T also recommends that applicants receive funds as needed, which would reduce unnecessary customer burdens, avoid large surpluses, and reduce financial risk to the funds.<sup>24</sup> Small LECs suggest a similar proposal of withholding funds until an audit is completed.<sup>25</sup> DRA agrees with the proposal that funds should be remitted as necessary. If the Commission sets milestones for releasing part of recipients total funding, and closely monitors progress toward those milestones, waiting until an audit has been completed may not be necessary to help prevent fraud and reduce risk. AT&T also

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<sup>21</sup> DRA Comments at 5.

<sup>22</sup> AT&T Comments at 4 and Sprint Nextel Comments at 8.

<sup>23</sup> SureWest Comments at 5, Verizon Comments at 5, Sprint Nextel Comments at 19-20, and AT&T Comments at 7. The matching amounts recommended vary, but the minimum proposed matching amount is 50%. Sprint Nextel suggests that the service provider provide 80% of the funds, and AT&T states that increasing the percentage costs borne by the applicant will increase chances of success.

<sup>24</sup> AT&T Comments at 6.

<sup>25</sup> Small LECs Comments at 5.



recommends procedures for recapture of funds and sanctions.<sup>26</sup> DRA agrees that procedures should be developed, but also notes that by setting milestones and remitting funds as needed, in addition to a bonding requirement, the need for recapturing misspent funds should be substantially reduced.

Commenting parties had various opinions regarding opening a 60-day window for additional applications once an initial application is submitted. Some concerns were expressed that such a process would harm the initial applicant, as that applicant could be disadvantaged by the other carriers having access to project details.<sup>27</sup> DRA does not know if this is accurate, and reiterates its recommendation that submitted data be treated in a confidential manner.<sup>28</sup> DRA does support this as an issue that the Commission should consider if it essentially creates a competitive bidding process.

CCTA/Time Warner and Verizon both support focusing a CASF program on completely unserved areas.<sup>29</sup> DRA believes that this might help prevent some anti-competitive subsidies. However, there still remain many unanswered questions regarding what an unserved area actually is. Is it only unserved by services and service providers applicable for a subsidy? Is it unserved by basic voice service, however that will be defined? Should these unserved areas proposed for funding only be those designated in fashion as “uneconomic” areas? SureWest recommends that the application area should be demonstrated as uneconomic to serve and that some indicia needs to be formulated to determine what is uneconomic for broadband, as some areas may be economic to serve although they are currently not served.<sup>30</sup> These issues, and others, need to be resolved before the Commission can implement a CASF.

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<sup>26</sup> AT&T Comments at 20.

<sup>27</sup> Verizon Comments at 12, Sprint Nextel Comments at 23, and AT&T Comments at 17.

<sup>28</sup> DRA Comments at 11, footnote 10.

<sup>29</sup> CCTA/Time Warner Comments at 1 and Verizon Comments at 4. SureWest recommends focusing first on unserved areas, then underserved. *See* SureWest Comments at 3.

<sup>30</sup> SureWest Comments at 3.

Sprint Nextel and Small LECs support beginning with a small program, and limiting the total amount of funding, as this may result in fewer market distortions and anti-competitive results.<sup>31</sup> DRA agrees that if a CASF is pursued at this time, especially without seeking more data and Legislative authorization, then it should be a small program with limited funding. Additionally, lacking the necessary deployment and demographic data, a discreet pilot project may be appropriate, as proposed by Sprint Nextel.<sup>32</sup>

#### **IV. CONCLUSION**

In these Reply Comments, DRA discusses some of the most problematic barriers identified by parties to creating and implementing a program like the proposed CASF. DRA urges the Commission to obtain granular deployment data to determine whether a CASF is actually necessary, and if so, where. DRA also notes that the legal obstacles to fully accomplishing the Commission's broadband objectives are best resolved by seeking legislative authorization. The Commission could then make specific determinations about policy issues, such as the definition of basic residential service and who will be able to participate. After these conditions precedent have occurred, the Commission

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<sup>31</sup> Small LECs Comments at 3 and Sprint Nextel Comments at 19.

<sup>32</sup> Sprint Nextel Comments at 23.

would then be in the best position to develop a broadband fund that has the potential to fully meet the Commission's objectives.

Respectfully submitted,

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October 3, 2007

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I hereby certify that I have this day served a copy of “**REPLY COMMENTS OF THE DIVISION OF RATEPAYER ADVOCATES IN RESPNSE TO THE ASSIGNED COMMISSIONER’S RULING ON PHASE II ISSUES RELATING TO THE “CALIFORNIA ADVANCED SERVICES FUND”** in **R.06-06-028** by using the following service:

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/s/ HALINA MARCINKOWSKI

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